Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19099/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 November 2019	**On 27 November 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

LORNA [C]
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Uchenna Okoroh, Counsel instructed by Gromyko Amedu Solicitors
For the Respondent: Ms Julie Isherwood, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge M A Khan promulgated on 11 July 2019 dismissing her appeal against the respondent's decision to refuse her leave to remain in the United Kingdom on human rights grounds.

Factual matrix

2. The appellant is a Jamaican citizen who visits her daughter and the daughter's four children, her grandchildren, in the United Kingdom regularly for 6 months a year on a multi-entry visit visa. The appellant has been coming and going, on visit visas, for several years. When in Jamaica, she lived with her own mother until her mother died in July 2018.

3. On the last occasion, the appellant entered on 8 May 2017 but failed to embark when her visa expired on 8 November 2017 and overstayed, making an application for leave to remain on health grounds in October 2017 following a hospital admission for various chest problems. The appellant did not seek to return to Jamaica and recover her passport from the respondent in July 2018, when her own mother died, but her daughter did go to Jamaica for a visit then, leaving the grandchildren in the appellant's care.

4. The daughter has four children, of whom the youngest, born in July 2016, is autistic. The daughter has not returned to work since his birth, and her relationship with the children's father seems to have broken down at about the same time. She took a formal career break from December 2017 which has been extended to expire on 1 July 2019. At the date of hearing, therefore, she was not at work.

5. The children's father lives in Southall, about a mile from his children's home, and he visits Jamaica about twice a year, for a month each time. The father does not pay regular maintenance, but the daughter has made no claim against him because 'he provides whenever she asks him to do so'. The children see their father, several times a year. The Judge regarded the daughter's evidence as vague and evasive on the frequency of visits and the appellant's account that she did not see him or know where he was living to be mendacious, since the daughter said that her mother knew he lived in Southall.

6. The daughter likes having the appellant care for her children. She could afford to hire a carer for them but feels more comfortable with her mother doing it. The appellant's own mother had been assisted by her grandmother in the same way, when the appellant was herself a child in Jamaica, following a cultural tradition.

7. The children are very fond of the appellant, who sometimes takes them to school and doctors' appointments, as well as to church on Sundays. The appellant would miss her grandchildren if she had to return to Jamaica.

Refusal letter

8. The appellant's application on 31 October 2017 for leave to remain on human rights grounds was advanced on the basis of the appellant's ill health, and her alleged parental relationship with her daughter, who lives in the United Kingdom with her four children and is an adult, not with the children. That is the application which the respondent considered.

9. The respondent refused leave to remain in a refusal letter of 4 September 2018. The respondent noted that the appellant had been in the United Kingdom for just 5 months when the application was made. The respondent did not consider that EX.1 was applicable because the relationship of mother and adult daughter is not one of parent and child. There was no suggestion that the appellant had a parental relationship with her grandchildren at this stage.

10. The respondent did not consider that there were any exceptional circumstances for which leave to remain ought to be granted outside the Rules. The appellant relied upon her admission to Hillingdon hospital in October 2017 with a severe chest infection and a peripheral pulmonary embolism, which on investigation proved to be connected to a papillary carcinoma. The respondent considered that there was treatment in Jamaica for the appellant's health.

11. The appellant appealed to the First-tier Tribunal, asserting that she was the parent, not of her daughter but of her grandchildren. She did not challenge any element of the respondent's decision but sought to advance a different case. The respondent has not objected to this, either at the First-tier Tribunal or before the Upper Tribunal.

First-tier Tribunal decision

12. The First-tier Judge concluded that the role played by the appellant in her grandchildren's lives was that of any other grandparent, and that she had not undertaken parental responsibility as claimed:

> "26. … I find that [the parental status] aspect of the case has simply been added on to the case as a desperate measure. The little help that [the appellant] does give, and I find it is not a great deal, is one of a carer rather than parental role. …
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> 28. The appellant [said that] she and her daughter had talked about the fact what may happened [sic] if this appeal failed. Her daughter said that they had not talked about it, but it is excepted [sic] that [the] appellant would have to return to Jamaica if her appeal failed. The appellant's daughter has not worked since the birth of her youngest child in December 2016. I find that she has been, and continues to be, there for her children and the appellant's role in the children's life has been little or nothing. She has simply been there as a helper and no more. I find that this situation can continue in [the] absence of the appellant. If the appellant's daughter decides to return to work, she can hire a carer, as she stated in her evidence before me.
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> 29. I find that whatever role the appellant has played so far in the lives of her grandchildren has been [that of] any other grandparent and [she] has not undertaken parental responsibility as claimed. The oral evidence of the appellant and her daughter is extremely vague and evasive, not credible or consistent. …"

13. There was no challenge in submissions before the First-tier Tribunal to the exceptional circumstances health-related case which had been the subject of the refusal letter.

Permission to appeal

14. The grounds of appeal advanced were that the judge erred in his credibility findings; that he failed to make a best interests assessment under Section 55 of the 2009 Act; that he failed to answer any of the five *Razgar* questions; and finally, that he erred in fact in concluding that the appellant as the grandmother to her daughter's children was in the role of their father.

15. First-tier Judge Fisher granted permission, but excluded from his grant the appellant's challenge to the credibility findings which he considered to have been open to the judge on the evidence. First-tier Tribunal Judge Fisher also noted that the judge's decision contained many grammatical errors but that was not a ground of appeal and appears to an observation, rather than an additional ground.

16. I am seised therefore only of three issues: the claimed error of fact in relation to the appellant's parental role with her grandchildren, the section 5 best interests assessment, and the First-tier Judge's failure to answer the *Razgar* questions.

Is the appellant a 'parent'?

17. The finding that the appellant is not a parent is a finding of fact. I remind myself that the First-tier Judge is the fact-finding Judge, having had the benefit of all the evidence, oral and documentary, when reaching his decision. The Upper Tribunal may only go behind a finding of fact by the First-tier Tribunal in the limited circumstances set out in the judgment of Lord Justice Brooke at [90] in *R (Iran) v The Secretary of State for the Home Department* [2005] EWCA Civ 982, that is to say where the finding is perverse, *Wednesbury* unreasonable, contrary to the weight of the evidence or incomprehensible to the reviewing judge.

18. In this appeal, the First-tier Judge did consider the claimed cultural role for grandmothers in Jamaican society, where there is an absent father, to step in as an additional parent. However, on the evidence, the Judge found that these children have both a mother and a separated but involved father and accordingly there was no empty parental role for the grandmother to fill. That was a finding which was open to him on the evidence that he heard and received.

19. The effect of that finding is that this appellant is not entitled to assert that she has family life with her grandchildren, as opposed to private life, absent any *Kugathas* dependency by her on her daughter, or vice versa. The evidence before the Judge did not meet the high standard required for

Kugathas dependency and I do not consider that family life is engaged here.

Section 55 best interests

20. The First-tier Judge did not make an express section 55 finding about the best interests of the grandchildren. That was an error of law, but I do not find that it was material. There was very sparse evidence before him about the best interests of the grandchildren. There is nothing from the school. There is very little medical evidence: at page 18 of the bundle which was before the First-tier Judge it is noted that one of the children was overdue for a dental examination and that is all, apart from some appointment letters about the youngest, who has autistic spectrum disorder.

21. At page 17 there is a letter from the Reverend Lloyd Crossfield at the Freedom Worship Centre to the effect that the appellant takes her grandchildren regularly to his church on a Sunday and is a woman who lives by Christian principles. The Reverend Crossfield says:-

> "The appellant's family means the world to her and she makes herself available to them in every way possible; especially her grandson who has autism as he requires more attention".

He describes the appellant as a lady of good character. He does not appear to be aware that she is a long-term overstayer in the United Kingdom.

22. That is the highest that the best interests case could have been put, even had the judge directed his attention to it. His omission to make a reasoned section 55 decision is not material to the outcome of the appeal, given the sparseness of the evidence advanced.

The *Razgar* questions

23. I turn next to the broader *Razgar* point. The judge set out the *Razgar* questions at paragraph 30 and it would have been more appropriate had he then continued to deal with them, which he did not. The Judge found that there was no family life, and that the family would be able to cope in the appellant's absence. There would undoubtedly be an interference with the family's private life, capable of engaging Article 8(1) of the ECHR but such interference is in accordance with the law.

24. The real question is whether the interference with the appellant's private life and that of her grandchildren would be proportionate. In that respect, any judge considering the appellant's private life would be required to consider the statutory presumptions in part VA of the Nationality, Immigration and Asylum Act 2002 (as amended).

25. The appellant's family visits gave her only precarious status, and for the rest of the time her private life developed when she was here unlawfully.

The Judge would be bound to give little weight thereto, pursuant to subsections 117B(4) and (5) of the 2002 Act.

26. Accordingly, the conclusion that the judge would have reached would have been the same.

Conclusions

27. Having regard to the Judge's findings of fact and credibility, I am satisfied that even had the judge considered section 55, or applied the wider *Razgar* test, he would have reached the same conclusion.

28. Neither error is material. The decision of the First-tier Tribunal is upheld.

DECISION

29. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law, but such error was not material to the outcome of the appeal.

I do not set aside the previous decision but order that it shall stand.

Signed Judith AJC Gleeson Date: 22 November 2019

Upper Tribunal Judge Gleeson